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No. 80-2144

In the Supreme Court of the United States

OCTOBER TERM, 1980

RODRIGUE J. FRANCOIS, PETITIONER

v.

ROBERT NIMMO, as ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION, UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this action, brought under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, petitioner claims that his discharge from a Veterans Administration Hospital residency program for poor performance was in fact caused by the hospital's failure to carry out its duties under an affirmative action plan.

1. Petitioner, a 44-year-old Haitian physician, brought this action following his discharge in early 1978 from the residency program in ophthalmology at the Veteran's Administration Hospital in Tuskegee, Alabama (Pet. App. A3). He alleged that discrimination based on his age and his national origin caused the discharge (*ibid.*). The hospital denied petitioner's claims and argued that he was discharged because of his poor performance as a resident (*id.* at A6-A7).

The core of petitioner's action in the district court was his claim that the hospital's Chief of Ophthalmology at the time of his discharge, Dr. Allman, was prejudiced against the petitioner because of his Haitian origin and his age. As a result, petitioner asserted, Dr. Allman's evaluations of his work were unfavorable and, following review by various hospital committees, he was dismissed on her recommendation (Pet. App. A5-A6). At trial, petitioner testified that Dr. Allman had made disparaging remarks about Haitians, but other testimony tended to undercut this claim (*id.* at A11-A12 & n.2). Petitioner further asserted that shortly before his discharge there had been a personality conflict between Dr. Allman and her predecessor, Dr. Settler, who had tried to help petitioner improve his performance. It was established that Dr. Settler, by then employed elsewhere, had assigned petitioner to work with him in the afternoons so that Dr. Settler could continue to supervise petitioner (*id.* at A10).[1] According to petitioner,

[1] At the time in question, Dr. Settler, who nominally remained Chief of Ophthalmology of the Tuskegee VA Hospital, had assumed a position at the John Andrew Hospital of Tuskegee Institute, and Dr. Allman "was carrying on the functions of Chief of Ophthalmology at the VA Hospital" (Pet. App. A5 n.1).

this arrangement created problems for him, as he was also expected to be on duty at the VA Hospital for part of this time (*id.* at A10, A18). Finally, petitioner claimed that Dr. Allman assigned him extra reading to do at night, further burdening him with work (*id.* at A10). It was this unusual treatment by his supervisors which, petitioner argued, was responsible for any unsatisfactory aspects of his work at the VA Hospital.

The district court carefully reviewed the evidence that supported Dr. Allman's unfavorable evaluation of petitioner's work (Pet. App. A9-A26). The court found that the evidence demonstrated petitioner's habitual lateness (*id.* at A9), absenteeism (*id.* at A9-A13), dishonesty (*id.* at A14-A16), failure to take a home studies course required for his residency program (*id.* at A18), and unacceptable performance of medical tasks (*id.* at A19-A20, A24-A25). The district court concluded that respondent had shown that petitioner was discharged for legitimate reasons and that petitioner had "failed to establish by a preponderance of the evidence that he was deprived of any rights because of his Haitian nationality or because of his age" (*id.* at A26-A27). The court of appeals affirmed this decision without opinion (Pet. App. A28) and denied a petition for rehearing (Pet. App. A29-A30).

2. The decision below is correct, does not conflict with any decision of this Court or of any other court of appeals, and does not warrant further review.

As is noted above, the district court found that petitioner had not borne his burden of proof of establishing that he was the victim of employment discrimination. In his petition, however, petitioner asserts that he is entitled to relief because his discharge was brought about by the VA Hospital's

failure to follow its own affirmative action guidelines (Pet. i, 34-35). This contention was rejected, *sub silentio*, by the district court in finding that petitioner's unsatisfactory performance was the cause of, and was a sufficient ground for, his termination. This argument was renewed in the court of appeals but was rejected there as well. In any event, the record discloses that petitioner's supervisors took affirmative steps in an attempt to correct the deficiencies in his performance. For instance, special conferences were set up to counsel petitioner (Pet. App. A22) and he was given extra reading assignments (*id.* at A10). Indeed, petitioner seeks to characterize as discriminatory the very efforts made by his supervisors to help him to upgrade his performance (*ibid.*). The VA regulations required no more, and assuredly offered petitioner no guaranty of success in the Ophthalmology Residency Program.

No matter how the issue is framed, this case is governed by the law that applies to all employment discrimination cases. As the district court observed (Pet. App. A7), the burden of proof in an action alleging age discrimination or discrimination based on national origin shifts to the employer once the plaintiff-employee has established a prima facie case. In order to rebut plaintiff's evidence, the employer has only to show that the discharge was "for good cause." *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). In *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 6, this Court held that the employer must "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-

discriminatory reason," thereby rejecting the standard applied by the Court of Appeals for the Fifth Circuit in that case, which had required the employer to prove the absence of discrimination by a preponderance of the evidence. *Burdine* underscores the correctness of the standard applied by the district court in this case.[2]

The district court's determination that respondent had shown legitimate reasons for petitioner's discharge was upheld by the court of appeals. Petitioner's contentions amount to a disagreement with the district court's view of the facts in this case. No basis is presented, however, for a departure from the settled practice of this Court to decline to review such disputed factual questions when both of the courts below have resolved them in the same way. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

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[2] Petitioner apparently does not dispute the relevance of this standard to his action (see, *e.g.*, Pet. 52). He argues, however, that his allegation that the VA failed to comply with its own affirmative action plan constituted part of a prima facie case of discrimination and that the VA Hospital was accordingly required to show that petitioner would not have been treated any differently "had he received the benefits to which he was entitled" in order to rebut this charge (Pet. 46, 48). Assuming *arguendo* the soundness of this contention, it is unavailing to petitioner. In *Jones* v. *Cleland*, 466 F. Supp. 34 (N.D. Ala. 1978), aff'd, 619 F.2d 82 (5th Cir. 1980), the only case cited by petitioner in support of his contention, the court found that, had the employer's affirmative action plan been fully implemented, the plaintiff-employee would have been given the job for which she applied. 466 F. Supp. at 38. By contrast, here, the findings of the district court establish that the VA's alleged failure to follow its affirmative action guidelines was not the cause of petitioner's termination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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